

**SEA SIDE ASSOCIATES LIMITED  
PARTNERSHIP,**

Appellant

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**AGBCA No. 2004-142-2**

**DECISION OF THE BOARD OF CONTRACT APPEALS**

**July 27, 2004**

**Opinion for the Board by Administrative Judge POLLACK.**

On February 17, 2004, the Board received this appeal filed by Sea Side Associates Limited Partnership (Appellant) of Edmonds, Washington. The appeal was from a Bill of Collection dated February 6, 2004, relative to a lease agreement between Appellant and the U. S. Forest Service (FS). Under the Bill of Collection, the FS charged the Appellant \$75,242.84 for carpet and installation in the FS leased facility. The dispute concerns that charge. After holding a telephone discussion with the parties, the Board treated the Bill of Collection letter as a deemed denial. In that same discussion, the parties agreed that the appeal would be treated as an expedited appeal subject to binding mediation with no right of appeal. A proceeding was held in Enterprise, Oregon, on July 15, 2004. The parties did not come to a voluntary agreement and pursuant to the parties' mutual agreement, the Board rendered a determination on the dispute. This is a summary decision setting out the basis for the Board decision.

The Board has jurisdiction over the timely-filed appeal pursuant to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended (CDA).

Appellant was the lessor of property rented by the FS in Enterprise, Oregon. As part of its obligation as lessor, the Appellant was to change the carpeting when required. No one disputes that the existing carpet needed replacement. The initial lease was dated June 17, 1987, and had provisions regarding the replacement carpet to be installed. The dispute concerns the replacement and the installation of the carpeting pursuant to the lease.

Appellant contends that the various carpet samples it offered materially met the specifications and should have been accepted by the FS. The FS contends otherwise, and during the dispute, the FS principally rejected Appellant's carpet submissions on the basis that the carpet offered by Appellant did not meet the lease specifications, because the offered carpet either required or recommended the use of chair pads. After considerable dialogue and a disputed work order, the FS purchased and ultimately installed carpet (Lee's), which the Appellant had contended exceeded the specification requirements. The FS charged the sum it paid for the carpet and installation against the rent otherwise due Appellant.

The FS charged Appellant a total of \$75,242.84. Of that \$26,256.50 was listed as carpet cost. The sum, however, was arrived at by using \$39,626.50, the amount the FS actually paid for the carpet, less \$13,370 which the bill of collection designated as "Forest Service share of the new carpet." How the \$13,370 was arrived at and exactly what it represented was never fully explained. The remaining charges on the bill of collection were \$43,282.00 for carpet installation and \$5,704.34 for Forest Service administrative costs. The Appellant claimed that it could have purchased and installed carpet meeting the lease specifications for \$26,250.

As a matter of background, there were a number of changes in how carpets were manufactured, particularly as to backings and pile height, which occurred between the time the lease was entered into and the date of the replacement. Because manufacturing processes and material changed over the life of the initial lease, some aspects of the original carpet specifications were rendered obsolete. Consequently, rather than looking at exact compliance with the original specifications; on some features, the carpet had to be assessed on the basis of material compliance. That being said, nothing in the initial specifications or in later changes in manufacturing made the non-use of chair pads mandatory. Chair pads are required or recommended by a number of manufacturers as a means of extending the life of carpet. The insistence by the FS on carpet which did not recommend or require chair pads was derived from a FS specification that developed after the lease had been entered into and was not the specification for the lease in issue. That new specification specifically added a requirement that carpet purchased under it could not require chair pads. The FS in the proceeding before the Board properly conceded that the chair pad requirement was a change to the contract. Nevertheless, the CO had used that specification as the primary basis for rejecting the Appellant's submissions and as the basis for purchasing the disputed Lee's carpet. The CO had no right to rely on the new specification.

There are three primary matters to be resolved in this dispute: (1) the cost of the carpet material, (2) the amount of carpet, and (3) the cost of installation. There are also cross claims for administrative costs. Finally, there is a question raised by the FS as to whether the Appellant breached the lease

when it did not provide carpet and installation in accordance with a work order of December 2002. In that work order, the FS directed the Appellant to provide it with additional carpet samples and further noted that the samples were to be in accord with “new carpet specifications, as agreed upon.”

The use of the phrase “as agreed upon” in the work order was not accurate. Rather, Appellant had specifically asserted that it had not agreed to another specification and the record contains letters where the Appellant stated that the referenced specification had not been agreed to, but rather was a change to the lease. The Appellant asked in its letters for the FS to issue an order acknowledging the change. Moreover, after the issuance of the work order, discussions continued with the FS over the matter. The FS and Appellant never achieved closure on the matter. Instead, the FS purchased the Lee’s carpet in August 2003. Then discussions ensued as to installation, with Appellant indicating problems in securing an installer and particular concerns over warranty matters. The FS started installation of the carpet at the end of December 2003.

### **Cost of the Carpet**

The evidence shows that the FS requirement for a product which would not use chair pads was based on a specification built around Lee’s carpet. The FS contended that there were other “or equal” products. Appellant asked the FS to identify such products, but received no such guidance. Moreover, there is no evidence that any of the “or equal” products would have been any cheaper than Lee’s as to material or installation. What is clear is that the Lee’s carpet was beyond the specification requirements. Among the carpets submitted by the Appellant was the Ayers carpet by Shaw. The FS claimed that Ayers carpet did not materially meet the original specification, however, that allegation was not established. Rather, the evidence presented appears to support the proposition that Ayers carpet materially met the original specification. We note that Ayers carpet was provided and indeed installed in the visitor center portion of the building, during an earlier phase of carpet replacement. While the FS claimed problems with unraveling as well as other concerns, the evidence did not that establish that Ayers carpet did not meet the original specifications.

The record shows that Appellant could have secured Ayers carpet at \$10.43 per square yard. Appellant contended, and it is accepted that the \$10.43 price included freight cost. The FS paid \$19.90 per square yard for Lee’s carpet. The Appellant is entitled to the difference in price between the two carpets, when the per yard price is multiplied by the number of square yards required, as addressed below.

### **Amount of Carpet**

The record shows that the FS paid for 1,933 square yards of carpet. Appellant contends that the amount is excessive and claims that the area could have been carpeted with 1,525 square yards. To establish the accuracy of its claimed yardage, the FS relies on the installer who placed the carpet, the quote from the provider who sold it the carpet, and from a separate measurement by some FS personnel. The FS installer conceded that he did not make a final tally of what carpet was left after installation. To establish its yardage estimate, the Appellant relies on quotes from two separate installers, one which provided a quote of 1,525 square yards and the other which provided a quote of

1,600 square yards. The amount of carpet used will vary depending on the installer and how the carpet is laid or measured. There are instances where one could reduce the carpet amount, but that could well increase the labor costs. When that is taken into account, the exact amount of carpet that would have been required, but for the use of the Lee's, is not entirely clear. The evidence does not establish to a certainty a specific yardage.

The record, however, does show that of the 1,933 square yards claimed by the FS, 100 square yards was used for cove molding. The record shows that because of the nature of the Lee's carpet (its stiffness and other qualities) the cove molding had to be precut and the installer could not use scraps and overages, as would have likely been the case with a different product. That 100 square yards is thus deducted as not being necessary, but for the use of the changed product. That leaves 1,833 square yards. Of the two measurements provided by the Appellant, the 1,600 square yards is more believable. The 1,525 appears too optimistic. To arrive at a figure, the best measurement is to take the difference between the 1,600 and 1,833 square yards. Thus, 1,716.5 square yards is the proper amount to be charged for installation.

### **Installation**

The FS paid \$43,282 for installation. Portions of that sum can be attributed to the fact that it is more expensive and time consuming to install the Lee's carpet. Further, it appears that the installer charged the FS a premium due to concerns he had as to various contingencies. The FS did not use competitive bidding for the work and had already purchased the material at the time it wrote Appellant and gave Appellant an opportunity to install the carpet. It needs to be recognized that Enterprise is in a rural area and that not all carpet installers are qualified or willing to install Lee's. Further, in the fall of 2003, the Appellant was taking steps to try to find an installer. Appellant ultimately concluded that for installation of the Lee's carpet, it would likely not find a better price than that found by the FS. The installation of the Lee's carpet was more expensive than the alternative put forth by Appellant. For that reason, a segment of the cost to the installer is attributable to the choice by the FS of the Lee's product. Installation of another product would have been less expensive. The Appellant is entitled to the difference between what the FS expended and is charging it and the reasonable cost of installing the Ayers product.

The Appellant provided two quotes as to installation. Each of the quotes had a component for furniture removal and tearing out the carpet. The installer used by the FS had considerably higher numbers for each of these items. The FS, in establishing a cost, relied on statements of the installer, who did address some of the differences due to Lee's. The FS also provided the pricing used by the state of North Carolina on its contracting for carpet. That information breaks down costs for various tasks (identified as additives), such a tearing out carpet, moving furniture, disposing of carpet and other tasks. Since the North Carolina costs are overall numbers, those costs can serve as a guide, but will of course vary depending on conditions and severity. The figures used by the installers providing quotes to the Appellant appear unduly optimistic. The costs of the FS installer, particularly as to furniture removal appeared high.

Weighing the various evidence as to the installation costs, taking into account the nature of the work, taking into account that some work was on weekends and that significant amounts of furniture and equipment had to be moved, looking at the actual costs of installation, the North Carolina pricing and finally, based on having done a walk through with the parties, the Board determined \$12.75 per yard to be a reasonable figure for the installation process. That cost includes not only installing the carpet on floors and stairs, but the tear out, the moving of furniture and other tasks. In addition to the \$12.75 a yard, an additional \$1,275 is added for 1,275 lineal feet of installation for cove molding at \$1 a lineal foot. Also, \$1,000 is added for floor preparation. When the \$12.75 is multiplied by 1,716.5 the base installation cost is \$21,885.37. When the cove installation and floor preparation are added to that sum, the total is \$24,160.37. That cost is in lieu of \$22.39 per square yard for installation (\$43,282) paid by the FS.

### **Administrative Costs**

The claimed administrative costs are denied both as to Appellant and the FS. Many of the FS costs were incurred because of insistence that the specification for the Lee's was not a change. As to the Appellant, the costs being claimed are administrative and thus, overhead. Dealing with disagreement and solving problems are part of the management of a lease and while there was considerable discussion and correspondence, the dialogue and events were not so extraordinary that we find it outside the scope of what could be expected.

### **Breach Claim**

The FS raised the issue of breach on the part of the Appellant. It claims the Appellant breached the lease agreement when it did not proceed in accordance with the work order dated December 10, 2002, which set a due date of January 2, 2003. As noted above, the work order, by stating in part, "attached are the new carpet specifications, as agreed upon," referenced an agreement between the parties as to the specification that was never made. The Appellant's disagreement with the new specification was stated in several letters. Moreover, the direction in the work order was to submit "six new carpet samples that meet the attached specification in order to make a selection as soon as possible." The FS attempted to walk a line between directing a particular product and claiming it was making no direction. Even after the work order was issued, Appellant and FS continued a dialogue over what was required and who was responsible. The dialogue was never adequately closed and to the extent it was closed, closure took place only when the FS purchased the Lee's carpet.

More importantly, however, even if the FS had established that there was a breach due to the Appellant not proceeding in purchasing the Lee's material and installing it, there is no damage to be shown by the FS due to that claimed breach, The FS would have accepted nothing other than a Lee's or equal (not required by the lease). It has claimed throughout the dispute that its costs for purchasing the Lee's and installing it were reasonable. It did not claim that it had to pay a premium due to actions of the lessor.

Absent the FS connecting an overage of payment to the actions of the Appellant, which would be inconsistent with the FS position during the dispute (FS claimed its costs of installation and material

were reasonable), the FS can show no damage due to the alleged breach. Once the FS purchased the Lee's carpet, the options available for Appellant as to installation were limited. Warranty normally requires the use of an approved installer and given the location of the facility, those would be limited. Moreover, due to concerns from earlier unrelated disputes, Appellant was reluctant to proceed with any changed work, absent a specific change order. Finally, here the FS stated in the order asking for additional samples that it was acting pursuant to an agreed specification. The fact that there was no such agreement provides justification for the Appellant to have continued to conduct a dialogue which, as noted above, was not closed by a direction to provide the carpet, but rather closed by the purchase of the Lee's product by the FS.

**DECISION**

The amount due the FS for the carpet and its installation is \$17,903 for the carpet material and \$24,160.37 for the installation for a total of \$42,063.37. The FS in the bill of collection dated 6 February 2004, charged back \$75,242.84 against the rent. Included in the \$75,242.84 was also a charge of \$5,704.34 for administrative costs claimed by the FS. The difference between what the FS has charged back and the amount the carpet and installation should have cost but for the change is \$33,179.47. Appellant is entitled to be reimbursed that sum. This is a final judgment. By agreement of the parties this represents a final decision and neither party will seek reconsideration or appeal the decision.

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**HOWARD A. POLLACK**  
Administrative Judge

**Issued at Washington, D.C.**  
**July 27, 2004**